PERMANENT MISSION OF THE UNITED STATES TO THE WORLD TRADE ORGANIZATION
MISSION PERMANENTE DES ÉTATS-UNIS D'AMÉRIQUE
AUPRÈS DE L'ORGANISATION MONDIALE DU COMMERCE
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March 7, 2001

Mr. Michael Cartland
Chairman
United States - Measures Treating Export Restraints as Subsidies (DS194)
World Trade Organization
Centre William Rappard
Rue de Lausanne 154
1211 Geneva 21

Dear Mr. Chairman:

My authorities have instructed me to submit the following comments regarding *Canada's Answers to the Questions Posed at the Second Substantive Meeting of the Panel* ("*Canada's Second Answers*"), dated March 2, 2001. For the reasons set forth below, the United States respectfully requests that the Panel take these comments into consideration.

While the United States, in general, disagrees with the legal arguments set forth in *Canada's Second Answers*, those arguments largely repeat prior arguments made by Canada, and it is not the wish of the United States to engage in yet another round of briefing by repeating the rebuttals it already has made. Instead, the comments set forth below relate largely to three new pieces of factual information that were attached to, and discussed in, *Canada's Second Answers*; specifically, CDA-137, 138, and 140 as they relate to the concept of a "legislative rule" under U.S. administrative law. This is new factual information on which the United States has not had an opportunity to comment. The United States believes it is important that the following points be brought to the Panel's attention.

The other area on which the United States would like to briefly comment concerns Canada's answer to Question 1(a) posed to it by the United States. Although Canada does not submit new information in its answer to that question, it makes a factually erroneous assertion that, in the view of the United States, requires correction.

The Panel's Question 13 and Legislative Rules

In responding to Question 13 from the Panel, Canada submits as evidence two U.S. court decisions, *National Family Planning and Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227

(D.C. Cir. 1992) (CDA-137), and *Troy Corporation v. Browner*, 120 F.3d 277 (D.C. Cir. 1997) (CDA-138). Canada appears to allege that these cases set out some new and different standard for identifying a legislative rule, but, in fact, these cases are not inconsistent with the cases previously cited by the United States. Having said that, however, there are certain important points concerning these cases that Canada omits from its discussion.

In *Troy*, the complainant, like Canada in the instant dispute, alleged that a regulatory preamble constituted a legislative rule. Canada accurately summarizes the court's discussion of the criteria for a legislative rule, but it omits the court's discussion of the criteria for a general policy statement. The court said that "first, a general statement is one that 'does not impose any rights and obligations' and, second, that a policy statement generally leaves the agency and its decisionmakers free to exercise discretion." 120 F.3d, at 287 (citations omitted). Canada also omitted the statement by the court that "[w]e will also consider an agency's characterization of its own actions, although that characterization is not dispositive." *Id* (citation omitted).

Finally, Canada omitted the court's discussion of why it did not find the preamble in question to constitute a legislative rule. The court stated as follows:

> Applying these principles, we conclude that the EPA's exposure policy was exempt from the notice and comment requirements of section 553. The EPA's exposure policy merely informed the public that the agency would exercise its discretion by considering exposure only for low toxicity chemicals. The EPA did not thereby curtail this discretion; it did nothing more than clarify its own position. The policy does not impose rights or obligations or bind the agency to a particular result. Chemicals of low toxicity may be added despite the policy, just as chemicals of moderate or high toxicity are not necessarily added because of it. *Id.*

This statement could easily apply to the portion of the DOC Preamble at issue in this dispute. The DOC Preamble, at most, merely informed the public of the DOC's tentative thinking regarding the interpretation of the new section 771(5)(B)(iii) of the Tariff Act. This clarification of the DOC's position did not impose rights or obligations or bind the DOC to a particular result. In this regard, in its answers to Questions 1 and 2 posed by the United States, Canada failed to cite a single case – judicial or administrative – where a court or the DOC has said that the DOC is legally bound by the type of preambular statement at issue in this dispute. Moreover, Canada effectively admits that the DOC is not so bound in its answer to Question 16 from the Panel. There, Canada asserts that the DOC could simply cease to apply the alleged "legislative rule" of the Preamble in future cases. However, if the Preamble is a "legislative rule", then it is binding, and the DOC cannot simply decide to ignore it.

This latter point was made clearly in *National Family Planning*. In that case, the agency in question issued "Directives" which the court found had the effect of amending a prior legislative rule promulgated in the form of a regulation. In striking down the Directives, the

court stated that "an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked." 979 F.2d, at 234 (citations omitted). The court added: "It is a maxim of administrative law that: 'If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.'" *Id.*, *quoting* Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 396.

Thus, under U.S. law, if the Preamble actually were a legislative rule, it could be amended or revoked only by going through notice-and-comment rulemaking. Canada's assertion that the DOC could disavow the Preamble simply by publishing a *Federal Register* notice to that effect or announcing some action in an actual CVD case is incompatible with Canada's claim that the Preamble is a binding, legislative rule.[1]

Finally, Canada cites to pages 234-235 of volume I of the Davis & Pierce administrative law treatise (CDA-140). The United States does not disagree with Davis & Pierce that many legislative rules perform an interpretative function. Indeed, while no precise taxonomy has ever been prepared, a fair number of the DOC's regulations could be described as performing an interpretative function.

However, Canada draws a false conclusion from the professors' otherwise unobjectionable statement. The professors say that some legislative rules perform an interpretative function. They do not say, as Canada claims, that any rule which performs an interpretative function thereby is a legislative rule. Otherwise, there would be no distinction between a legislative rule and an interpretative rule. Instead, more is required for a legislative rule, particularly an intent on the part of the agency that it be bound.

Canada's Answer to Question 1(a) from the United States

In paragraph 52 of *Canada's Second Answers*, Canada is unable to come up with a single example in which a reviewing court of the DOC has held that the DOC is bound by a regulatory preamble that, like the portions of the Preamble at issue in this dispute, is unrelated to any regulation. This failure is telling, but Canada attempts to dismiss this failure by referring to the fact that the DOC regulations have been in effect only since 1997.

Of course, the question was not limited to the DOC regulations currently in force, and Canada attempts to create the misimpression that DOC regulations have existed only since 1997.

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[1] Another interesting aspect of *National Family Planning* can be found on page 239 of the decision. There, the court cites a prior decision called *Fertilizer Institute*, in which the U.S. Environmental Protection Agency set out in a preamble to a rule a detailed interpretation of a statutory term. According to the *National Family Planning* court, in *Fertilizer Institute* it held that the preamble did not constitute a legislative rule, notwithstanding the apparent detail of the agency's interpretation.

In fact, the first comprehensive set of DOC regulations were published in 1980, when the DOC assumed the responsibility for administering the U.S. AD/CVD laws. The DOC published notices of final rule at 45 Fed. Reg. 4,932 (January 22, 1980) (CVD), and 45 Fed. Reg. 8,182 (February 6, 1980) (AD). These regulations were thoroughly overhauled in 1988-89 with the publication of notices of final rule at 53 Fed. Reg. 52,306 (December 27, 1988) (CVD), and 54 Fed. Reg. 12,742 (March 28, 1989) (AD). During this period and after, there also were more modest rulemaking proceedings which amended the then-existing regulations. Each of these rulemaking proceedings – both the major and the minor ones – would have been accompanied by preambles explaining the regulations that were being promulgated. Thus, this is not a situation in which there has been insufficient time for there to be many court decisions, as claimed by Canada in paragraph 52. The United States does not know the precise number of court decisions that have been issued regarding DOC AD/CVD determinations, but would estimate that the number is at least over one thousand.

Similarly, Canada's assertion in paragraph 52 that "Commerce's regulations are rarely if ever challenged as such" is also misleading, because the status of Commerce's regulations certainly has been litigated. Canada itself has cited court decisions for the proposition that the DOC is bound by its *regulations*. *See* CDA-33 and CDA-122. One would think that if, as alleged by Canada, the DOC treated regulatory preambles of the type at issue in this dispute as binding, legislative rules, U.S. courts would have opined on this behavior at least once. However, despite the fact that DOC regulations have been in effect in one form or another for over twenty years, Canada has been unable to identify a single case – either judicial or administrative – supporting its assertion that the DOC is bound by the type of regulatory preamble at issue in this dispute.

This dearth of authority is not surprising because the simple fact is that the DOC is not so bound. As discussed above, even Canada admits as much in its answer to Question 16 from the Panel.

Sincerely,

Bruce Hirsh
Legal Advisor

cc: H.E. Mr. Sergio Marchi, Permanent Mission of Canada